(3)

Supreme Court, U.S.
FILED
MAR 17 1999
OFFICE OF THE CLERK

No. 98-1155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ELECTRIC ENGINEERING COMPANY,

Petitioner,

vs.

CALPINE CORPORATION; WILLIAM B. BETCHART; ENERVEST CORPORATION and ENERVEST MANAGEMENT CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

MARK S. SUSSMAN
Counsel of Record
17001 N.E. 6 Avenue
North Miami Beach, Florida 33162
(305) 652-4910

MARK L. POMERANZ
POMERANZ & LANDSMAN
Co-Counsel
12955 Biscayne Boulevard
Suite 202
North Miami, Florida 33181

Attorneys for Petitioner

151924

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

10cc

TABLE OF CONTENTS

Page

Table of Cited Authorities ii

EEC Committed No Violations Of Discovery As To Respondents Calpine Or Enervest, Wherefore The Terminating Sanctions As To Them Were Unwarranted, Unauthorized By The Rules Of Procedure, And Unjust Punishment. Also, It Was Reasonable For EEC's Counsel To Calculate 31 Days For Filing Objections To The Magistrate's Report Awarding Sanctions. 1

Misleading Restatement of the Case 2

Erroneous Reasons for Denying the Writ 5

"20 Days" May Reasonably Mean "31 Days". 6

Supreme Court Rule 14(4) 7

Conclusion 7

TABLE OF CITED AUTHORITIES

Page

Cases:

Adriana International Corporation v. Thoeren, 913 F.2d 1406 (9th Cir. 1990) 5

Harrigan v. Mason & Winograd, Inc., 397 A.2d 514 (R.I. 1979) 6

Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958) 6

Rule:

United States Supreme Court Rule 14(4) 7

Other Authority:

Webster's New World Dictionary of the American Language (2d College ed. 1984) 1

EEC COMMITTED NO VIOLATIONS OF DISCOVERY AS TO RESPONDENTS CALPINE OR ENERVEST, WHEREFORE THE TERMINATING SANCTIONS AS TO THEM WERE UNWARRANTED, UNAUTHORIZED BY THE RULES OF PROCEDURE, AND UNJUST PUNISHMENT. ALSO, IT WAS REASONABLE FOR EEC'S COUNSEL TO CALCULATE 31 DAYS FOR FILING OBJECTIONS TO THE MAGISTRATE'S REPORT AWARDING SANCTIONS.

Smoke screen: 1. a cloud of smoke spread to screen the movements of troops, ships, etc. 2. anything said or done to conceal or mislead. *Webster's New World Dictionary of the American Language* (2d College ed. 1984).

Calpine's Brief In Opposition is nothing more than a "smoke screen", and this Court should re-read it with a few important facts in mind:

1) EEC provided full and complete responses to all of Calpine's requests for discovery. (Pet. App. 14a, 36a).

2) Calpine's counsel received and retained five boxes of original documents, including the notorious Carroll Memo, for several months, (Pet. App. 36a), and never looked at the documents; nor had an associate, law clerk, paralegal, or secretary look at the documents; nor had them photocopied. (Pet. App. 14a, 36a).

3) The sanctions initially entered against EEC were for alleged failure to respond to discovery propounded by Credit Suisse, not Calpine; nor did Calpine play any role in Credit Suisse's discovery or motion for sanctions.

4) Enervest never propounded any discovery at all.

5) Respondent's present counsel is the same who received the boxes of original documents from EEC and failed to review them; therefore, his personal stake in the outcome of this petition clouds his perceptions as well as his presentation of the facts.

MISLEADING RESTATEMENT OF THE CASE

In carefully couched language, Respondent misstates the facts of this case and attempts to mislead this Court.

> a) "[The Magistrate Judge] noted past orders compelling EEC to comply with discovery, as well as issuance of substantial monetary sanctions against EEC. He found that EEC had willfully concealed the Carroll memorandum and willfully disobeyed court orders."

(Brief In Opposition, p. 3).

There was, in fact, only one order compelling entered against EEC, which was the same order granting monetary sanctions against EEC. The seemingly numerous other orders referred to by Respondent were actually entered against American Home Assurance Company ("AHA").

> b) "He also found that American Home, acting in active concert with tacit agreement of EEC, destroyed the existence of the Carroll memorandum."

(Brief In Opposition, p. 4).

In fact, the Carroll Memo was never destroyed. The original was produced to Respondent Calpine in the five boxes delivered to counsel's office. (Pet. App. 14a, 36a). Also, a copy was produced to all parties prior to the hearing on Credit Suisse's Motion For Sanctions. (Pet. App. 13a).

> c) The five boxes of original documents, including the Carroll Memo, were produced to Calpine on "February 4, 1992", and picked up by EEC's new counsel on "March 27, 1992, but before Calpine's counsel reviewed them. As Calpine's counsel advised EEC's counsel, 'I have not yet had the chance to review the documents, and I would like access to them again after your review.' EEC later produced its documents, but without the Carroll memorandum."

(Brief In Opposition, pp. 4-5).

First, by his own admission, Respondent's counsel had nearly two months to review these documents but did absolutely nothing in that regard. Second, counsel brings a self-serving quote without any basis or record support; not even an appendix document to validate this alleged statement.

Third, in reference to EEC's later production of its documents, Respondent fails to disclose that it was in response to the discovery request of Credit Suisse. As already stated, Calpine played no role in Credit Suisse's discovery. Further, Calpine never requested that the documents be produced again.

> d) "Calpine actively participated in discovery in the case. It served multiple sets of requests for

> production of documents and interrogatories, both before and after delivery of EEC's documents to EEC's new counsel. Its attorney spent several weeks in depositions. Calpine also obtained an order compelling EEC to respond to Calpine's discovery."

(Brief In Opposition, p. 5).

Again, no support is offered for the misrepresentations here. Calpine's only other discovery consisted of a subpoena for production of records, a request to produce, and interrogatories, all directed solely to the determination of whether EEC had the proper contractor's license for the job for which it had contracted. Calpine never propounded any other discovery requests directed to the general litigation.

Whereas Calpine did at one point obtain an order compelling production against EEC; that order was satisfied.

> e) "Though Calpine's counsel had the memorandum, he returned EEC's documents before he had a chance to read them. . . . When the documents were later produced, the Carroll memorandum was conspicuously absent."

(Brief In Opposition, p. 5).

Respondent admits to having the five boxes of documents at least from February 4 through March 27, 1992. Respondent admits that the Carroll Memo was among those documents.

Now, incredibly, Respondent claims he did not have "a chance" to read them during the minimum two months they were in his possession.

Also, in true misleading style, Respondent fails to point out that "when the documents were later produced", it was in response to the discovery request of Credit Suisse. Calpine never asked for the five boxes back again.

> f) "EEC also argues that the Ninth Circuit failed to consider the Adriana factors, ... Second, the Ninth Circuit specifically considered each of the five Adriana factors. It noted that the Magistrate Judge and District Judge also expressly considered those factors."

(Brief In Opposition, pp. 6-7).

EEC never argued that the lower tribunals failed to consider the five factors set forth in *Adriana International Corporation v. Thoeren*, 913 F.2d 1406 (9th Cir. 1990). In fact, each court did consider the factors as between EEC and Credit Suisse.

But EEC's contention, as set forth in its Petition, is that the lower tribunals failed to "independently" apply the *Adriana* factors to Calpine and Enervest each individually; parties against whom EEC committed no wrong. This error by the lower tribunals is readily apparent from review of their reports/orders/opinions which are attached as part of the Appendix to EEC's Petition.

ERRONEOUS REASONS FOR DENYING THE WRIT

Respondent also brings erroneous and misleading arguments in its Brief In Opposition.

a) Calpine asserts that the lower tribunals found "willfulness, fault, or bad faith" in EEC's failure to comply with

discovery. (Brief In Opposition, pp. 8-9). However, Calpine craftily omits the fact that EEC's alleged failure was regarding discovery propounded by Credit Suisse. Respondent Calpine, by its own admission, received full and complete responses to its discovery requests. EEC exhibited no "willfulness, fault, or bad faith" vis-a-vis Calpine.

b) Respondent's reliance on *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958), is misplaced. (Brief In Opposition, p. 10). EEC never made a showing of any inability to comply with the order compelling production because, as to Calpine and Enervest, EEC fully responded to all discovery requests.

c) Respondent's reference to *Harrigan v. Mason & Winograd, Inc.*, 397 A.2d 514, 517 (R.I. 1979), is also misleading. (Brief In Opposition, p. 11). Calpine and Enervest's petitions to extend the terminating sanctions in their favor came only after the recommendation of sanctions had been entered in favor of Credit Suisse. Without justification or right, Respondents wanted to ride the coattails of Credit Suisse in spite of their own indolence.

"20 DAYS" MAY REASONABLY MEAN "31 DAYS".

Calpine argues that EEC's interpretation that "20 days means 31 days" is frivolous. However, this argument is not frivolous, particularly when the Court recognizes that, under the Federal Rules of Civil Procedure, 10 days most definitely means at least 17 days. EEC would refer this Court to its Petition for comprehensive argument on this issue, particularly the discussion regarding the standard for a determination of "frivolousness". (Pet. pp. 17-21).

SUPREME COURT RULE 14(4)

It should be very clear, based upon the foregoing, that it is not EEC who has misstated the factual record, but rather Calpine who would misdirect and mislead this Court.

CONCLUSION

The issue of the propriety of sanctions entered against EEC in favor of Credit Suisse is not presented in this Petition. That matter has settled and is now moot.

However, the error in the sanctions granted to Calpine and Enervest is very much at issue; and, since EEC committed no violation as to these two parties, the sanctions can be nothing more than unjust punishment. Even the Ninth Circuit, when examining solely this issue, recognized the injustice in blaming EEC for Calpine's attorney's failure to take advantage of documents which sat in his office for "several months". (Pet. App. 71a-103a).

Respondent, like the lower tribunals, has painted with too broad a brush. By presenting its smoke screen, it attempts to mislead this Court into believing that any "sins" allegedly committed by EEC against Credit Suisse were automatically committed against Calpine and Enervest.

Just like the smoke screen, Respondent's facts and arguments are without substance, and it offers nothing in support but carefully calculated and self-serving words.

It is appropriate for this Court to review the issues of whether, how far, and under what circumstances sanctions may be extended to benefit uninjured parties. This Court should

establish some national guidelines in this matter since none presently exist.

This Court should grant the Petition for Writ of Certiorari, reverse the rulings below, remand for vacation of the terminating sanctions against EEC in favor of Calpine and Enervest, and order that this matter proceed to a full trial as to these parties.

Respectfully submitted,

MARK S. SUSSMAN
Counsel of Record
17001 N.E. 6 Avenue
North Miami Beach, Florida 33162
(305) 652-4910

MARK L. POMERANZ
POMERANZ & LANDSMAN
Co-Counsel
12955 Biscayne Boulevard
Suite 202
North Miami, Florida 33181

Attorneys for Petitioner